

1 Joseph E. Addiego III (CA State Bar No. 169522)
Salle E. Yoo (CA State Bar No. 182703)
2 DAVIS WRIGHT TREMAINE LLP
One Embarcadero Center, Suite 600
3 San Francisco, California 94111
Telephone: (415) 276-6500
4 Facsimile: (415) 276-6599
Email: joeaddiego@dwt.com
5 salleyoo@dwt.com

6 Attorneys for Plaintiff
7 Clearwire Spectrum Holdings, LLC
8
9

10 IN THE UNITED STATES DISTRICT COURT
11 THE NORTHERN DISTRICT OF CALIFORNIA
12 OAKLAND DIVISION

13 Clearwire Spectrum Holdings, LLC, a Nevada) Case No. 06-03808 SBA
limited liability company,)
14 Plaintiff,) **ORDER GRANTING CLEARWIRE'S**
15 v.) **APPLICATION FOR PRELIMINARY**
16 Peralta Community College District, a California) **INJUNCTION**
public agency,)
17 Defendant.) **Hon. Sandra B. Armstrong**
18

19 TO ALL PARTIES AND THEIR ATTORNEYS:

20 Having considered the papers submitted in support of and in opposition to Plaintiff
21 CLEARWIRE SPECTRUM HOLDINGS, LLC's ("Clearwire") Application for a Preliminary
22 Injunction, the evidence and the arguments offered by the parties in connection therewith, this
23 Court GRANTS the Application as follows:

24 The Court finds as follows:

25 Findings of Facts

26 1. That Clearwire did not fail to perform a material obligation under the EBS Excess
27 Capacity Use and Royalty Agreement, entered into by CSH and Defendant on December 22, 2005
28

1 (“Agreement”), specifically that the Agreement did not impose on Clearwire any material
 2 obligation to provide Defendant with a “side letter” nor “side agreement”;

3 2. That Defendant failed to follow the termination procedures set forth in Section
 4 12(b) of the Agreement;

5 3. That Defendant did not properly terminate the Agreement such that it remains in
 6 full force and effect;

7 4. That Clearwire has performed all of its material obligations under the Agreement;

8 5. That Defendant failed to perform its material obligations under the Agreement by,
 9 *inter alia*, failing and refusing to cooperate in the preparation of the FCC Long Term Lease
 10 Application;

11 6. That the parties expressly agreed in the Agreement that “the rights reserved to each
 12 of them hereunder are of a special, unique, unusual and extraordinary character, and that
 13 irreparable harm would occur in the event that any of the agreements and provisions of this
 14 Agreement were not performed fully by the parties hereto in accordance with their specific terms
 15 or conditions or were otherwise breached, and that money damages are an inadequate remedy” and
 16 that each of them is “entitled to an injunction or injunctions to restrain, enjoin, and prevent
 17 breaches of this Agreement by the other party and to enforce specifically such terms and
 18 provisions of this Agreement in any state or federal court of the United States”;

19 7. That Plaintiff has no adequate remedy at law, in that the 2.5 GHz spectrum is
 20 extremely scarce and such spectrum is presently unavailable in Oakland and the San Francisco
 21 Bay Area. Further, the calculation of the value of the spectrum provided to CSH under the
 22 Agreement would be extremely difficult and costly to ascertain;

23 Conclusion of Law

24 1. That Clearwire likely will succeed on the merits regarding its claim for Declaratory
 25 Relief, including but not limited to obtaining a declaration from this Court that Clearwire has not
 26 breached any material obligation imposed on it by the Agreement, because Clearwire was not
 27 required by the Agreement to provide Defendant with the supposed side letter, and because
 28

1 Defendant did not properly follow the termination procedures under the Agreement, such that the
2 Agreement remains in full force and effect;

3 2. That Plaintiff likely will succeed on the merits in showing that Defendant has failed
4 to perform its material obligations under the Agreement;

5 3. That Clearwire likely will succeed on the merits regarding its claim for Specific
6 Performance, because Clearwire has performed all of its material obligations under the
7 Agreement, but Defendant has failed to perform its material obligations under the Agreement by
8 not cooperating in the preparation and filing of the FCC Long Term Lease Application, and further
9 because the spectrum like that which is the subject of the Agreement is rare and otherwise owned
10 or encumbered in the Oakland/San Francisco Bay Area market, and damages for Defendant's
11 failure to perform are difficult and expensive to ascertain, such that there is no adequate remedy at
12 law that will compensate Clearwire for Defendant's failure to perform and otherwise abide by the
13 Agreement;

14 4. That Plaintiff faces a possibility of immediate, irreparable injury unless the Court
15 enters a preliminary injunction restraining the unlawful conduct addressed herein and,
16 alternatively or additionally, that the balance of hardships with respect to the specifically requested
17 restraints tips decidedly in Plaintiff's favor, as a denial of the reasonable temporary injunctive
18 relief requested by Plaintiff would injure it far more than the granting of such relief will harm
19 Defendant, if at all, since Defendant has not yet begun receiving monthly payments under the
20 Agreement.

21 Accordingly, GOOD CAUSE APPEARING, IT IS HEREBY ORDERED that Defendant,
22 its officers, employees, agents, representatives and all persons active in concert and participation
23 with any of them are enjoined and restrained from engaging in or performing any of the following:

- 24 a. any acts that would effect the transfer, sale, assignment or lease to any third
25 party or otherwise dispose of or encumber any of the spectrum that is the
26 subject of the Agreement between CSH and Defendant.

27 IT IS HEREBY FURTHER ORDERED that, pursuant to Federal Rule of Civil Procedure
28 65(c), this Order shall become effective upon Plaintiff's filing an appropriate undertaking of

1 \$100,00.00, by August 1, 2006, and shall remain in effect throughout the course of this litigation,
2 or until further order of the Court, whichever comes earlier, and may be extended by consent or
3 upon a showing of good cause.

4
5 DATED this __18th__ day of July, 2006.

6 By: *Saundra B. Armstrong*
7 SAUNDRA BROWN ARMSTRONG
8 UNITED STATES DISTRICT JUDGE
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DAVIS WRIGHT TREMAINE LLP